THIS ORDER IS NOT A PRECEDENT OF THE TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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July 6, 2021

Cancellation No. **92075375**

Common Sense Press Inc
DBA Pocket Jacks Comics

v.

Antonio J. Malpica and
Ethan Van Sciver (joined as party defendant)

By the Trademark Trial and Appeal Board:

Since the filing of Common Sense Press Inc.'s ("Petitioner") petition[1] on October 1, 2020, to cancel Registration No. 6102744, numerous papers have been filed by Antonio J. Malpica, without the benefit of an attorney, including a putative answer to the petition for cancellation and counterclaim[2] as well as a motion to compel[3] and motion to dismiss.[4] This matter now comes up on Petitioner's motion for judgment on the pleadings and, in the alternative, motion to strike the answer and counterclaim.[5] The motion has been fully briefed.[6]

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1 1 TTABVUE.

2 4 TTABVUE (confidential).

3 7 TTABVUE (confidential).

4 8 TTABVUE (confidential).

5 5 TTABVUE.

6 5 TTABVUE, 6 TTABVUE and 9 TTABVUE (confidential version at 10 TTABVUE).

Mr. Malpica's Filings

Preliminarily, it is incumbent upon the Board to note the various defects in Mr. Malpica's filings. First, each of the filings appears to consist of a confidential version of the filing as well as a redacted version also designated as confidential. This is improper. The official record of a Board proceeding is to be made available for public inspection and copying. *See* Trademark Rule 2.27(d), 37 C.F.R. § 2.27(d). To the extent confidential materials are to be filed with the Board, they are to be submitted under separate cover clearly identifying the material as confidential, with an appropriately redacted public version concurrently but separately filed. *See* Trademark Rule 2.126(c), 37 C.F.R. § 2.126(c). Mr. Malpica failed to do so. As a result, the redacted version of each filing was shielded from public view in contravention of Trademark Rule 2.27(d). To remedy the matter, the redacted version of each filing has been separately entered into the proceeding file at 14 TTABVUE, 15 TTABVUE and 16 TTABVUE and made available for public viewing.

Second, for those filings subsequent to his answer and counterclaim, Mr. Malpica merely copied the certificate of service accompanying the answer and counterclaim as evident in each certificate of service from the consistent reference to the paper being served as the "Answer to Cancellation," the date of service as November 9, 2020, and the misspelling of November ("NOVEMEBER"). To the extent that Petitioner has confirmed receipt of the papers by way of email dated December 10, 2020,[7] and in view of the Board's entry of the redacted version of each

[7] 11 TTABVUE 5-6.

filing, the Board sees no need to forward the filings to Petitioner. Notwithstanding, Mr. Malpica is advised to take care that he comply with the Board's service requirements as set forth in Trademark Rule 2.119, 37 C.F.R. § 2.119, in all future papers filed with the Board.

Finally, since the Board deems a proceeding suspended as of the filing of a potentially dispositive motion concerning all matters not germane thereto, *see* Trademark Rule 2.127(d), 37 C.F.R. § 2.127(d), Mr. Malpica's motions to compel and to dismiss will be given no consideration as they were filed during the pendency of Petitioner's motion for judgment on the pleadings and are not germane thereto.

Motion for Judgment on the Pleadings / Motion to Strike

Turning to Petitioner's motion for judgment on the pleadings, it is **DENIED** as the motion is based on a submission that the Board does not construe as a proper pleading. Mr. Malpica's submission of November 9, 2020, is less a cognizable answer to the petition under Fed. R. Civ. P. 8(b) than it is merely argument more appropriate to a brief on the case. The filing is, therefore, unacceptable as a responsive pleading upon which a motion for judgment on the pleadings may lie.[8] *See, e.g., Lopez v. Nat'l Archives & Records Admin*., 301 F.Supp.3d 78, 83 n.6

[8] To the extent the filing raises a putative "counterclaim" to cancel Petitioner's pleaded applications, no consideration has been given thereto because (1) pleaded applications are not subject to a counterclaim for cancellation, *see Int'l Tel. & Tel. Corp. v. Int'l Mobile Machs. Corp*., 218 USPQ 1024, 1026 (TTAB 1983) (counterclaim to "refuse any application filed by petitioner" was improper), and (2) the counterclaim was not accompanied by the requisite fee. *See* Trademark Rules 2.6, 2.111(d), and 2.114(b)(3)(iii), 37 C.F.R. §§ 2.6, 2.111(d), and 2.114(b)(3)(iii); *Sunway Fruit Prods., Inc. v. Productos Caseros, S.A.*, 130 USPQ 33, 33 (Comm'r 1960) (fee requirement is statutory and cannot be waived).

(D.D.C. 2018) ("Pleadings are closed for Rule 12(c) purposes when a complaint and an answer have been filed.").

Indeed, Petitioner appears to recognize the insufficiency of the filing in alternatively moving to strike the submission based on Mr. Malpica's failure "to admit or deny the allegations contained within Petitioner's Petition for Cancellation[,] [either] specifically or generally," or to otherwise "respond properly to Petitioner's allegations."[9] Thus, the motion to strike is well taken and is hereby **GRANTED**. *See Temperato v. Rainbolt*, 22 F.R.D. 57, 58-59 (E.D. Ill. 1958) (striking answer found to be "verbose, argumentative, and redundant [and] in gross violation of Rule 8 of the Federal Rules of Civil Procedure"). Mr. Malpica's submission of November 9, 2020, is **STRICKEN**.

Motion to Join and Appearance of Counsel

As a final matter, Scott Houtteman, Esq., of Houtteman Law LLC, filed notice[10] on April 15, 2021, of an assignment[11] of the involved registration to Ethan Van Sciver[12] on April 14, 2021, and moved to join Mr. Sciver as a party defendant in this matter. As the assignment occurred after the commencement of this proceeding and as Petitioner has not raised any objection thereto, the motion to join is **GRANTED**. *See* Trademark Rule 2.127(a), 37 C.F.R. § 2.127(a).

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9 5 TTABVUE 17-18.

10 13 TTABVUE.

11 The assignment has been recorded in the Assignment Recordation Branch at Reel/Frame 7256/0446.

12 The filing incorrectly identifies Mr. Sciver as Ethan Van Sciber, contrary to the assignment documents provided as part of the filing.

Since Mr. Sciver is the assignee and party in interest in this matter, the correspondence information for Mr. Sciver and Mr. Malpica (collectively "Respondents") has been updated to reflect Mr. Houtteman as the primary correspondent for Respondents.

As issue has yet to be joined in this matter, Respondents are allowed until **AUGUST 2, 2021**, to answer the petition for cancellation or to otherwise move in regard thereto.

Proceedings are **RESUMED** in accordance with the following schedule:

Time to Answer	**8/2/2021**
Deadline for Discovery Conference	**9/1/2021**
Discovery Opens	**9/1/2021**
Initial Disclosures Due	**10/1/2021**
Expert Disclosures Due	**1/29/2022**
Discovery Closes	**2/28/2022**
Plaintiff's Pretrial Disclosures Due	**4/14/2022**
Plaintiff's 30-day Trial Period Ends	**5/29/2022**
Defendant's Pretrial Disclosures Due	**6/13/2022**
Defendant's 30-day Trial Period Ends	**7/28/2022**
Plaintiff's Rebuttal Disclosures Due	**8/12/2022**
Plaintiff's 15-day Rebuttal Period Ends	**9/11/2022**
Plaintiff's Opening Brief Due	**11/10/2022**
Defendant's Brief Due	**12/10/2022**
Plaintiff's Reply Brief Due	**12/25/2022**
Request for Oral Hearing (optional) Due	**1/4/2023**

Generally, the Federal Rules of Evidence apply to Board trials. Trial testimony is taken and introduced out of the presence of the Board during the assigned testimony periods. The parties may stipulate to a wide variety of matters, and many requirements relevant to the trial phase of Board proceedings are set forth in Trademark Rules 2.121 through 2.125. These include pretrial disclosures, matters in evidence, the manner and timing of taking testimony, and the procedures for

submitting and serving testimony and other evidence, including affidavits, declarations, deposition transcripts and stipulated evidence.

Trial briefs shall be submitted in accordance with Trademark Rules 2.128(a) and (b). Oral argument at final hearing will be scheduled only upon the timely submission of a separate notice as allowed by Trademark Rule 2.129(a).

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